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IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,
Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York and JOSEPH E. KEEGAN, Collector of the City of New York,
Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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Opinions Below

The opinion of the New York Court of Appeals, not as yet officially reported, is reproduced in Appendix A, *infra*, p. 21. The opinion of Special Term, New York Supreme Court is reported at 17 Misc. 2d 104, 184 N. Y. S. 2d 142 (1959) and is contained in the Record on Appeal at pages 232-242. The Appellate Division, First Department affirmed, 10 A. D. 2d 841, 200 N. Y. S. 2d 359 (1960), without opinion.

Jurisdiction

This action was commenced by appellant in the Supreme Court of the State of New York, New York County, pursuant to Section 473 of the New York Civil Practice Act, for a judgment declaring that the New York City General Business Tax was unconstitutional as applied to the revenue received by appellant from exporters for offense against the Commerce Clause (Article I, Section 8, Clause 3) and the Import-Export Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, and for the refund of the tax paid for the year 1956. The New York Supreme Court granted appellees' motion for a declaratory judgment holding the city tax constitutional as applied to appellant's revenue from exporters; the Appellate Division affirmed the Supreme Court; and the Court of Appeals affirmed the Appellate Division. The judgment of the Court of Appeals of the State of New York, from which this appeal is taken, was dated and entered January 12, 1961 (App. A, *infra*, p. 27) and it is final. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). The notice of appeal was filed in the Supreme Court of the State of New York, New York County, on March 8, 1961.

Jurisdiction of this appeal is conferred on this Court by 28 U. S. C., Section 1257(2). Cases sustaining the jurisdiction of the Court on this appeal include *Texas Transport and Terminal Co., Inc.* v. *City of New Orleans*, 264

U. S. 150 (1924); *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434 (1939); *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947); *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Thames & Mersey Insurance Co. Ltd.* v. *U. S.*, 237 U. S. 19 (1915); *Brown* v. *Maryland*, 12 Wheat. 419 (1827); *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282 (1921).

Statutes Drawn in Question

The General Business and Financial Tax of the City of New York is authorized by Section 24(a) of the New York State General City Law (20 Consol. Laws of New York, Section 24-a; L. 1941, Ch. 199, Section 1, as amended), the pertinent provisions of which are set out in Appendix B, *infra*, p. 29. The city tax, based upon the enabling statute, is contained in Title B, Chapter 46 of the Administrative Code of the City of New York (Local Law 44 of 1948, as amended). Section B46-2.0 of the Code provides in pertinent part:

> "SEC. B46-2.0. IMPOSITION OF TAX—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, of or making sales within such city, for each of the periods of one year, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence * * *.

The foregoing provisions of the Code follow the enabling act, Section 24(a) of the General City Law, the validity of which is drawn in question on the ground that they violate the Commerce Clause and the Import-Export Clause of the Constitution of the United States.

Questions Presented

(1) Are appellant's services as an ocean freight forwarder in arranging for the movement of export cargo from an inland supply point across state lines to a foreign destination via an ocean carrier exclusively interstate and foreign in character, the gross revenue from which is exempt under Article 1, Sec. 8, cl. 3 of the U. S. Constitution (the "Commerce Clause") from a local tax imposed for the "privilege" of conducting business in the City of New York?

(2) Is a city gross receipts levy on the revenue from the forwarding of cargo by appellant from an inland point of origin to an overseas destination a tax on the "process of exportation" invalid under Article 1, Sec. 10, cl. 2 of the U. S. Constitution (the "Import-Export Clause")?

STATEMENT OF THE CASE

Facts

The facts are undisputed:

Appellant is an ocean freight forwarder and broker. Its principal place of business is New York City, where it employs approximately sixty people. As a forwarder and broker it renders various services required to coordinate the movement of export cargo from its interior supply point to a foreign destination aboard ocean carriers. Forwarders such as appellant are used by almost all exporters, most of whom are located at inland points beyond the port area.

At the outset appellant renders advice to its customer, usually the American exporter but occasionally the overseas purchaser, as to import and export licenses, letters of credit and the best port of exit for the particular shipment. It also advises as to the method of shipment to seaboard (rail or truck) and instructs the exporter as to the time when the goods are to move from the exporter's plant.

Appellant selects the vessel and arranges for space (booking the cargo) and as the consignee of the goods at the port it coordinates the movement to seaboard by following the shipment in its rail cars from carrier to carrier (tracing) and by checking with the carrier to see that cars "in bad order" (needing repairs) are put back in movement (expediting). To avoid delays in the loading aboard ship and to prevent the cargo from not being loaded (shut-out), appellant issues a specific order to the rail carrier, the Delivery Instructions (Def. Ex. D, R. 213), as to the precise time the shipment is to be lightered from the New Jersey rail terminal to shipside. Appellant makes certain that the goods arrive at the pier or shipside when needed and are loaded on board the ship.

Appellant prepares and processes necessary shipping documents. After it assures itself that the cargo is in the hold of the ship, a duty it owes to its shipper even though it does not physically handle the goods, appellant tenders the "on-board" bill of lading to the carrier for signature. It prepares and clears through the Custom House the Export Declaration (Def. Ex. F, R. 217) required by federal law for the exportation and processes through the appropriate foreign consul, when needed, a Consular Invoice (Def. Ex. G, R. 219), thus obtaining the clearance of the importing country for the shipment.

Appellant arranges for others to provide various accessorial services that may be required on the shipment, such as warehousing, cartage and marine insurance.[1] From time to time it consolidates for either the exporter or consignee on one bill of lading sundry shipments coming from different interior manufacturers, thereby effecting considerable economies.

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[1] Appellant is *not* a local insurance broker, as stated by the Court of Appeals (App. A, *infra*, p. 24). It arranges for such insurance through an insurance broker and charges the exporter a service fee to cover costs. The laws of New York permit appellant to perform this function without the necessity of being licensed as an insurance broker (N. Y. Insurance Law, Sec. 128).

Most of the shipments dispatched by appellant are prepaid, requiring it to present to the New York bank holding the letter of credit an "on board" bill of lading. Before it can do so, appellant must make certain that the shipment has actually been loaded on the ship and if there is a delay, it exerts pressure upon the steamship line to get the shipment on board. Failure to meet the ship may lose the sale. Thereafter, appellant furnishes the bank a complete set of shipping documents after which payment is made by the bank to the exporter under the letter of credit. Included in the payment is appellant's charge to the exporter.

For the various services it renders to get the shipment dispatched, appellant is compensated by both the shipper and ocean carrier on each shipment. From the shipper it receives a forwarding fee ranging from $10 to $20 per shipment and a small service fee to cover costs in arranging for accessorial services. It is the taxability of this gross revenue from the shipper that is in issue herein. Appellant receives also a commission of 1¼ to 2½% of the freight charge from the carrier, which appellees and the courts below have conceded is exempt from the city tax and is not in issue in this case.

The Questions Presented Were Ruled Upon Below

All of the questions presented were raised in the pleadings [2] and briefs and argued in the courts below. The New York Supreme Court sustained the validity of the statute and City Code and its judgment was affirmed by both the Appellate Division and the Court of Appeals. The Court of Appeals expressly ruled in its opinion on all the constitutional questions raised.

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[2] R. 17-27.

THE QUESTIONS PRESENTED ARE FEDERAL AND SUBSTANTIAL

POINT I

Appellant as an ocean freight forwarder is engaged exclusively in interstate and foreign commerce and is thereby exempt from the city privilege tax under the Commerce Clause.

Article 1, Section 8, Clause 3 of the U. S. Constitution, the "Commerce Clause", provides in pertinent part as follows:

> "The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States * * *."

It is fundamental that under the Commerce Clause neither a state nor a subdivision thereof may impose a tax for the *privilege* of conducting a business exclusively in interstate or foreign commerce. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959); *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954).

The precise issue herein is whether the business of the appellant as an ocean freight forwarder is exclusively in interstate or foreign commerce. The test, according to the Court of Appeals, is "whether plaintiff's local New York activity is such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. (*Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, 5 N. Y. 2d 347, 354, appeal dismissed 361 U. S. 3)." (App. A. *infra*, p. 24) This is the same test promulgated by this Court in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166 (1954). The Court of Appeals held that appellant's business as a forwarder did not meet the test on the ground that it was "local" and "separate" from the interstate process (App. A, *infra*, p. 25).

Appellant urges that the Court of Appeals has erred. The undisputed facts establish beyond any doubt that the forwarding function of appellant is an integral part of the interstate process, the flow of commerce, and cannot realistically be separated from it. In determining the port, coordinating the movement to shipside, tracing and expediting lost or delayed cargo, booking the shipment and preparing and processing necessary shipping papers, appellant is exercising so close a dominion and control over the movement of the goods that it cannot be said that its activities are "separate" from the flow commerce. Indeed, its activities are a *sine qua non* for the flow of the cargo. Until the appellant as a forwarder enters the picture, the goods destined for export lie dormant at the manufacturer's plant. The forwarder acts as the catalytic agent breathing life into the process of exportation, thus making it possible for the traffic to move across state lines into our foreign commerce. Goods sold for export must be forwarded and the simple fact is that *there would be no exportation* unless appellant and others like it rendered this service.

The view taken by the Court of Appeals that the appellant's services "constitute a local business and are separate and apart from [foreign] commerce" is not only patently at variance with the conceded facts but also in conflict with the pronouncements of every federal agency that has inquired into the role of the ocean freight forwarder. *In U. S.* v. *American Union Transport, Inc. et al.*, 327 U. S. 437 (1946), this Court noted "[t]he intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between * * * *" (p. 450). In that case it held that ocean freight forwarders were "carrying on the business of forwarding * * * in connection with a common carrier by water" and were, therefore, "other persons" as defined in the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801, *et seq.*) subject to federal regulation. One of the reasons for its holding, the Court noted, was that the activities of forwarders are "*intimately*

connected" with the receiving, handling, storing or delivery of property in foreign commerce under Section 17 of the statute (*Id.* at p. 449).

The House Merchant Marine and Fisheries Committee has concluded that "the work of freight forwarding is essential to the movement of goods in foreign commerce under normal conditions."[3] The U. S. Maritime Commission, after a lengthy investigation, described the forwarder as "an indispensable link between * * * shippers and carriers."[4] A federal review court has held that "forwarding activities have developed American commerce" and that forwarders are "an integral part of the commerce of the United States."[5] The trial court in this case has found that the forwarding activities of appellant "were vitally important to foreign and interstate commerce" (17 Misc. 2d 104, 109; 184 N. Y. S. 2d 142, 147).

It is inconceivable that appellant as a forwarder can be an "essential", "integral", "vital" and "indispensable" part of the movement of cargo in our foreign commerce and yet be considered, as it was by the court below, "separate from such commerce."

The forwarder is paid by both the exporter and the ocean carrier for the various services rendered in arranging for the exportation of the shipment. The office of the Comptroller, City of New York has acknowledged that appellant's revenue from the carrier is immune from the city levy because the forwarder's activities as a broker "are an integral part of foreign commerce" (Pl. Ex. 2, R. 206). The trial court agreed that appellant was "entitled" to this immunity but was unable to distinguish

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[3] H. Rep. 1681, 77th Cong., 2d Sess., p. 5.

[4] *Agreements and Practices Pertaining to Brokerage, etc.*, 3 U. S. M. C. 170, 174 (1949).

[5] *Atlantic and Gulf/West Coast of Central America and Mexico Conferences* v. *U. S.*, 94 Fed. Supp. 138, 141 (1950); see also *Pacific Westbound Conference* v. *U. S.*, 94 Fed. Supp. 649 (1950).

between the services rendered by appellant to carriers as a broker and those furnished to exporters as a forwarder. Indeed it found an overlapping and duplication of such services (17 Misc. 2d 104, 111; 184 N. Y. S. 2d 142, 149).[6] May it logically be said that appellant's gross revenue from exporters should be subject to the city levy and yet its receipts from ocean carriers be exempt, when the services rendered by appellant are the same to both parties, by the same personnel, on the same shipment and moving on the same vessel? The answer in the affirmative by the Court of Appeals would seem provincial. Forwarding services to the exporter and brokerage services to the steamer are inextricably interwoven and it cannot realistically be said that the former are "local" and the latter "in foreign commerce".

As the result of the decision by this Court in the *American Union Transport* case, *supra*, forwarders have been subject to direct and detailed regulation by the Federal Maritime Board. Under the authority of the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801) and the Merchant Marine Act, 1936 (46 U. S. C. § 1114) the Board has adopted General Order 72 (Pl. Ex. 5, R. 207) regulating forwarding activities in the same detail as the Board's regulation of ocean carriers under these statutes. The regulatory scheme is also similar to that exercised by the Interstate Commerce Commission over rail and motor carriers and domestic forwarders. All of these businesses have been held exempt from a local privilege tax.[7]

If the foregoing businesses are engaged in interstate and foreign commerce, then it may not reasonably be said

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[6] This Court similarly noted the duality of services to shipper and carrier in the *American Union Transport* case, *supra*, p. 442 fn. 6.

[7] Ocean carriers: *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326 (1887); rail carriers: *Fargo* v. *Michigan*, 121 U. S. 230 (1886); motor carriers: *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951); domestic forwarders: conceded exempt by the city (Pl. Ex. 2, R. 206).

that appellant, subject to identical federal control and working closely with these enterprises in the overseas dispatch of the goods, is in a "local" business. Moreover, this position of the Court of Appeals is in basic conflict with the assumption of jurisdiction over the activities of forwarders by the federal government under the U. S. Shipping Act. Section 33 dictates that the act shall not be "construed to apply to *intrastate* commerce" (46 U. S. C. § 832). If the business of forwarding is local, *i.e.*, intrastate, as the Court of Appeals held, then based upon the interdict of Section 33 the exercise of authority over forwarders by the Maritime Board under the Shipping Act is unlawful. On the other hand, if the business is interstate and foreign in nature properly subject to federal regulation, then the Court of Appeals has erred in holding forwarding to be a local or intrastate activity subject to the city tax. A resolution by this Court of this conflict in the forwarder's status is most desirable.

Unless the decision of the Court of Appeals is reversed, it would mean that the movement of goods in our interstate and foreign commerce can be effectively taxed out of existence by a state or subdivision thereof. American exporters would by local levies on the essential function of forwarding be placed at a disadvantage to their foreign competitors at variance with the constitutional purpose of conferring upon Congress alone the power to regulate commerce between the states and with foreign countries. *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 429 (1940). It would also mean that a port city, such as New York, may obtain a larger proportion of necessary revenue from the flow of commerce by taxing the gross revenue of forwarders. A primary reason for the adoption of the Commerce Clause was to avoid such a local toll on the passage of commerce through a locality, even though levied without discrimination. *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422, 433 (1947).

In upholding the tax herein, the Court of Appeals failed to recognize decisions of this Court conferring immunity from a local privilege tax upon persons directly involved in the movement of goods in interstate and foreign commerce. An exporter is exempt from a state gross receipts tax under the Commerce Clause on the ground that he is engaged in interstate and foreign commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917). The "indispensable" agent of the exporter who makes it possible for the exportation to take place is no less in such commerce and should receive the same tax immunity.

A steamship agent representing an ocean carrier which does not maintain its own office at the port is exempt from a local privilege tax. *Texas Transport & Terminal Co., Inc.* v. *City of New Orleans*, 264 U. S. 150 (1924). Such an agent, like the forwarder, does not physically handle the goods or assume transportation responsibility. It performs its services within the city limits on behalf of its absentee principal, just as in the case of a forwarder. The record herein shows that the steamship agent and the forwarder work closely together in the booking of the cargo, the coordination of the movement to shipside and in the preparation and processing of shipping documents (R. 175, fols. 524-525). If the carrier's agent at the port is exempt from a privilege tax, there is no cogent reason why the exporter's port agent should not receive a similar immunity. The services of each are essential to its respective principal and the tax treatment of these agents should be identical.

In *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434 (1939) this Court held that a marketing agent for fruit growers was exempt from a Washington gross receipts tax on the business done from that state on the ground that "the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in [interstate or foreign] commerce" (Id. at p. 437).

One of the primary services performed by the taxpayer in the *Gwin* case was "to attend to all traffic matters pertaining to shipment and transportation of the fruit" (Id. at p. 436). We see no basic difference in the essentiality of the services of the marketing agent and the forwarding agent. In both cases agents of the shipper are performing entirely within the taxing state a non-physical service required in the transportation of goods in interstate and foreign commerce. Assuredly, the forwarder's "vital" and "indispensable" services are no less important to the dispatch of the goods than those of the taxpayer in the *Gwin* case. The gross revenue of the forwarder should, therefore, be granted the same constitutional protection.

The Court of Appeals failed to treat any of the cases cited above by appellant in its brief in that court. Instead, it relied entirely on the decisions of this Court in *Canton Railroad Co. v. Rogan*, 340 U. S. 511 (1951), and *Western Maryland Railway Co. v. Rogan*, 340 U. S. 520 (1951), both decided on the same day, to deny immunity under the Commerce Clause. *There is not a single reference to this clause in either case.* On the contrary, each decision with particularity confines the issue to taxability under the Import-Export Clause (340 U. S. at p. 512 and 340 U. S. at p. 520) despite a belated attempt by the taxpayer in the *Canton* case to raise a constitutional question under the Commerce Clause in its brief in this Court. The Court of Appeals was in error, therefore, in citing these cases as authority to sustain the tax herein under the Commerce Clause.

But even if the court below was correct in this regard, the *Canton* case was misinterpreted. There was no question before this Court in that case as to whether the services rendered by the railroad therein were "local" or "interstate" under the Commerce Clause. Concededly, the railroading therein was an "interstate enterprise" (Id. at p. 515). Despite this fact, this Court in the *Canton* case was merely reiterating its long settled rule that a non-discriminatory gross receipts tax on a railroad, if fairly

apportioned to the business done within the taxing state, was valid. In the instant case, however, the proper apportionment of the tax is not involved, as the trial court found (17 Misc. 2d 104, 111; 184 NYS 2d 142, 149). The sole question is whether the forwarding services are local or in interstate and foreign commerce. The *Canton* case sheds no light whatsoever on this issue under the Commerce Clause.

Based upon the essential role that the forwarder plays in our foreign commerce, the detailed and direct regulation of its activities by the Federal government and the decisions of this Court in comparable factual situations it must be concluded that the Court of Appeals erred in holding that the appellant as a forwarder was engaged in a "local" business. Plenary consideration by this Court would be justified not only for these reasons, but also to prevent a serious inroad by the City of New York upon the constitutional safeguard against privilege taxes on the interstate and foreign process.

POINT II

The forwarding function of appellant is an integral part of the process of exportation which may not constitutionally be taxed by the City of New York under the Import-Export Clause.

Article 1, Section 10, Clause 1 of the U. S. Constitution (the Import-Export Clause) provides in part as follows:

> "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports * * *."

This Court has consistently held that the constitutional prohibition against a state impost on exports goes beyond a direct tax laid upon the goods themselves. The immunity extends to "the process of exportation and to the transac-

tions and documents embraced in that process * * *. Only on that construction can the constitutional safeguard be maintained." *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 81-81 (1946). Under this doctrine essential shipping documents have been held exempt from state and federal taxes. *Fairbanks* v. *U. S.*, 181 U. S. 283 (1901); *U. S.* v. *Hvoslef*, 237 U. S. 1 (1915); *Selliger* v. *Kentucky*, 213 U. S. 200 (1909). Immunity from a stamp tax was likewise granted to marine insurance policies on the ground that they were "an integral part of the exportation". *Thames & Mersey Insurance Co. Ltd.* v. *U. S.*, 237 U. S. 19, 26 (1915).

Forwarding activities must be granted a similar exemption if the constitutional protection of the Import-Export Clause is to remain meaningful. It cannot be said that a bill of lading or a marine insurance policy is more important to the process of exportation than the forwarding function, which, as previously noted, has been described as "essential", "indispensable" and "an integral part of the commerce of the United States."[8] An exporter may ship his goods without insuring them, although he would be imprudent to do so, but he cannot eliminate the forwarding function. It must take place on every shipment.

Sustaining the tax herein would run counter to the detailed precautions taken by our founding fathers in the Constitution to prevent obstructions to the flow of exports. They made it clear that the process of exportation should not in any way be restricted by either a federal or state tax. Thus, to prevent discriminatory action at the federal level it was provided that no preference could be given to the ports of one state over another (Art. 1, Sec. 9, Cl. 6); that all federal taxes must be uniform (Art. 1, Sec. 8, Cl. 1); and that there could be no federal tax on exports

[8] See footnotes 3, 4 and 5, p. 9, *supra*.

(Art. 1, Sec. 9, Cl. 5). In order to prevent any state from exercising a taxing power that the federal government was denied with respect to exports, it was also provided that no state could tax exports (Art. 1, Sec. 10, Cl. 2).

The evident policy of the Constitution was to avoid imposing upon inland producers the burden of paying tribute to seaboard cities for the privilege of exportation and thus maintain free and equal access to foreign ports for interior areas. If the constitutional policy can be avoided by shifting the tax from the exported article itself to some essential activity in the exportation, such as forwarding, then the policy is a practical nullity.[9]

This Court has held that the gross revenue of an exporter is exempt from a state tax under the Import-Export Clause. *Crew Levick Co.* v. *Pennsylvania, supra.* This revenue may include a fee from its customer, the overseas consignee, for forwarding services where the exporter does its own forwarding. If this revenue from forwarding by the exporter is exempt, as the city acknowledges in its regulations,[10] then the identical revenue should not be taxed when it is received by the forwarder for the same function. It is neither good sense nor good law for receipts for similar services to have a dual status under the city tax laws. Yet, this is precisely the situation in the City of New York if the Court of Appeals decision herein is not reversed.

In denying immunity under the Import-Export Clause to the appellant, the court below relied again upon the decisions of this Court in the *Canton and Western Maryland* cases, *supra.* The *Canton* case involved switching,

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[9] See the remarks of Mr. Justice Jackson in reserving decision in *Canton and Western Maryland, supra,* at pp. 515-517; see also 50 Michigan Law Review 152, 153 (1951).

[10] Regulations, General Business and Financial Tax, Office of the Comptroller, City of New York March, 1957 reprint edition, pp. 42-43.

storage, wharfage and weighing activities by a railroad within the City of Baltimore. In *Western Maryland* the tax was on the rail transportation within the state of cargo moving in export or import. This Court held in these cases that the export and import process began and ended "at the water's edge" and that "the handling of the goods at the port" by the taxpayers therein would not, therefore, be part of that process (Id. at p. 515). In the case *sub judice* the Court of Appeals apparently sustained the tax on the theory that the forwarding activities were comparable to the handling of the goods at the port and were, consequently, in the same category as the railroad operations held taxable in *Canton* and *Western Maryland* (App. A, *infra*, p. 25).

This was clearly error. In its own summary of the activities performed by the appellant the Court of Appeals noted that the forwarder "*never handles these goods at all*" (App. A, *infra*, p. 22, emphasis supplied). This is in accord with the finding of the trial court to the same effect (17 Misc. 2d 104, 105-106; 184 N. Y. S. 2, 142, 144). Rather, the forwarder coordinates and arranges for the movement of cargo from an inland supply point to a foreign destination. Manifestly, the Court of Appeals has improperly applied the decisions in the *Canton* and *Western Maryland* cases. This Court was dealing therein with the question of immunity from a state tax of those who had a *physical connection* with the movement of the goods *within* the state. This is precisely what the Court meant by the use of the word "handling". The cases did *not* determine the question as to whether essential forwarding services of a non-physical nature extending across state lines were part of "the process of exportation". Whether such service should be given the constitutional protection of the Import-Export Clause would appear to be one of first impression meriting review by this Court.

It is most doubtful that this Court intended the water's edge test to apply in the circumstances of this case. When do a forwarder's services begin and end? Obviously, in dealing with a necessary non-physical service in the transportation of goods the precise terminal points are not readily ascertainable. For example, the forwarder prepares and places into the export process the bill of lading on each shipment. When it arranges for this document to be received by the carrier and overseas consignee, *inter alia*, do not its services extend beyond "the water's edge?" Only by a review of the within case may it be determined with finality whether the *Canton* and *Western Maryland* cases were intended to apply to non-handling services necessary to the exportation extending across state lines into our foreign commerce.

Even if it be assumed, *arguendo*, that the water's edge test could properly be applied in this case, the record herein establishes that the appellant complies with such standard. It does more than merely "wait" until the goods are loaded on board the ship before it tenders the letter of credit to the bank, as the Court of Appeals states in its opinion (App. A, *infra*, p. 25). The undisputed testimony is that appellant owes a clearly defined duty to the exporter to be "sure" that the goods have been placed in the hold of the ship (R. 64, fols. 190-192). It fulfills this duty by checking with the steamship pier and when necessary, by exerting pressure with the steamship office "to get shipments loaded" (R. 123, fols. 368-369). This is its overall responsibility and undertaking with the shipper (R. 124, fol. 372). Thus, even though the forwarder is not responsible for the actual loading of the goods, it *is* responsible and must exercise reasonable care to see to it that the goods, properly documented, are loaded upon the designated ship. Negligence by the forwarder in the exercise of this responsibility can result in liability. *Princess Pat, Ltd., etc.* v. *National Carloading Corp., etc.*, 223 F. 2d 916 (1955).

It is apparent, therefore, that the forwarder's services do in fact extend beyond the water's edge until the goods are actually on board ship. Indeed, on many shipments it issues instructions (Def. Ex. D, R. 212) to the railroad to lighter the goods from the New Jersey side of the Hudson River directly to the ship at its berth on the New York side. The goods never reach the pier. This function of controlling and coordinating the movement of the goods by the rail carrier directly to the vessel likewise illustrates that appellant's services extend beyond the water's edge. Thus, the test has been met.

CONCLUSION

Appellant respectfully submits that the decision below is erroneous, in conflict with the decisions of this Court and the exercise of jurisdiction over appellant by the Federal government and is one of first impression; and that the Federal questions presented are substantial and merit plenary consideration and redress by this Court.

Respectfully submitted,

GERALD H. ULLMAN,
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April, 1961.

APPENDIX A

1. Opinion of the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

No. 341

MOHEGAN INTERNATIONAL CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK, & ors., &c.,

Respondents.

DESMOND, Ch. J.:

The appeal by plaintiff, on constitutional grounds, is from a unanimous Appellate Division, First Department, affirmance of a summary judgment which dismissed the complaint and declared the New York City General Business and Financial Tax constitutional as applied to plaintiff's receipts for services in New York City as a "freight forwarder", and denied recovery of taxes paid by plaintiff thereon for the year 1956. Plaintiff brought the action to have it declared that the tax (Administrative Code of City of New York, § 46-2.0) is unconstitutional as to plaintiff's business receipts since, according to plaintiff, it is a tax for the privilege of conducting a business which is interstate and foreign, and an impost on exports (U. S. Const., art. I, § 8, cl. 3; art. I, § 10, cl. 2).

The facts are undisputed. All the receipts taxed are produced by plaintiff's New York City activities. All the taxed activities are performed at the instance of and on

behalf of either domestic exporters or foreign importers and, described most generally, involve services of appellant at New York City in coordinating and expediting the movement from inland points to ocean carriers of American-produced goods which are carried by ship to foreign ports.

It is important to keep in mind that the city is not taxing those receipts of plaintiff which are paid by the ocean carriers—that is, the brokerage fees from the carriers for booking the cargoes and for incidental services for acting as a "foreign freight broker". The receipts which are taxed by the city and which plaintiff claims cannot constitutionally be taxed are performed for and paid for by the exporter (or foreign importer) who is moving goods from an inland point to a seabboard point. They are, in other words, services as a "foreign freight forwarder". The taxed services are described generally by appellant as those of "an ocean freight forwarder in arranging for the movement of export cargo from an inland supply point across state lines to a foreign destination" and "forwarding of cargo by appellant from an inland point of origin to an overseas destination * * *." A little overstatement is involved there since appellant, while it books space on the ships and collects and is not taxed on its fee for so doing, never handles these goods at all and has no warehousing, stevedoring or other cargo-handling facilities or functions but performs, for the shipper at New York City incidental services in helping the shipper get his goods to the right New York City pier at the right time. Appellant, of course, is not itself a shipper or exporter or common carrier, has no ownership of or other interest in the goods and never has actual or constructive possession of the goods or responsibility for them. It receives for its "forwarding" services not a commission but a fee based on the time appellant's

employees devote to each shipment. Its annual income (1956) for the forwarding part of its business was about $244,000. Most of its customers are American exporters. A few are overseas consignees.

The details of plaintiff's operations as a forwarder are set out in the record. As a first step, appellant obtains from the exporter and checks the foreign import license and letter of credit. It advises the exporter as to what port to select for shipment and as to method and time of shipment to that point, then makes a space reservation on a particular vessel after checking its facilities and sailing and destination time. On their movement to seaboard the goods are consigned to appellant and appellant, if necessary, checks on their progress so that they will arrive on time. But appellant does not control or direct the railroad's operations. It merely obtains information as to where the goods are from time to time. Carload lots usually reach seabboard by railroad and are lightered from New Jersey to a pier or to the ship. Smaller shipments come by motor trucks which carry them directly to the pier. Careful timing of arrival at the pier or ship is necessary so that the ship will not be delayed in sailing or the goods left behind. When necessary appellant arranges for delivery to the pier or steamer and prepares a dock receipt which the ship's master signs and which the ocean carrier uses as the basis for its bill of lading when later issued. Appellant prepares that bill of lading, putting the goods into the correct tariff classifications and gets the bill of lading signed at the steamship company's New York City office. Appellant advances the ocean freight money. It prepares and files at the United States Customs Office the export declaration required by Federal law and arranges for insurance on the goods. Also, it performs other incidental services of the same kind and makes separate charges for some of

them and for the printed forms it furnishes. There is in appellant's brief a sort of suggestion that appellant supervises or checks the loading of the goods onto the ship. However, the complaint does not so allege, there is no proof thereof and the affirmed finding is to the contrary. Appellant's functions as forwarder, therefore, consist of "tracing" the shipment from inland to seaboard so that it will arrive on the pier on time, preparing a number of documents, getting them signed and filed with the Customs House or banks, and obtaining insurance, as agent of the shipper. Appellant, however, is not itself an insurer but a local insurance broker.

We agree with Special Term that all these forwarding activities were local. The cases principally relied on in the Special Term opinion are *Canton R. R. Co.* v. *Rogan* and *Western Maryland R. R. Co.* v. *Rogan*, both reported in 340 United States (pp. 511, 520) and both dealing with the same Maryland State tax. Canton was a railroad company which, operating entirely within the city of Baltimore, performed switching, storage, crane and wharfage services as to goods about to be shipped abroad. The Western Maryland Company operated piers in Baltimore and at those piers and at a grain elevator handled and stored goods about to be exported. Respondent says appellant's services are essentially of the same kind as those held by the Supreme Court (in *Canton* and *Western Maryland*) to be subject to local taxation.

Much of appellant's brief is taken up by an elaborate showing of the importance and value of appellant's services, which seems beside the point. The test is whether plaintiff's local New York City activity is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it" (*Berkshire Spinning Assoc.* v. *City of N. Y.*, 5 N. Y. 2d 347, 354, appeal dismissed 361 U. S. 3). Plaintiff has been exempted from

the tax as to its income derived from acting as agent for the ocean carriers. The tax here is on its local services performed for non-carriers not including any actual transportation services or any responsibility for such service (see discussion as to appellant itself and other forwarders in *United States* v. *American Union Transport, Inc.*, 327 U. S. 437). Appellant's services are of course connected with and important to foreign commerce but they constitute a local business and are separate from such commerce.

As to this tax violating the Import-Export clause of the Federal Constitution (as distinguished from the Commerce clause), the law is that even the handling at the port of goods about to be exported are taxable local activities since the export processes "begin and end at the water's edge" and "any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process" (*Canton R. R. Co.* v. *Rogan*, 340 U. S. 511, 515, *supra*—see, also, *Western Maryland R. R. Co.* v. *Rogan*, 340 U. S. 520, 522, *supra*). Appellant is not responsible for loading of the goods and does not have its representative there although it must wait until they are loaded before it can tender the letter of credit to the bank.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed, with costs. Opinion by Desmond, Ch. J. All concur.

2. Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of January in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur January 12, 1961.

2. Judgment of the Court of Appeals

No. 341

Mohegan International Corporation,
Appellant,

vs.

The City of New York, & ors., &c.,
Respondents.

Be it remembered, That on the 14th day of October in the year of our Lord one thousand nine hundred and sixty, Mohegan International Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Gerald H. Ullman, its attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Gerald H. Ullman, of counsel for the appellant—and by Morris L. Heath, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted

to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, January 12, 1961.

I HEREBY CERTIFY that the preceding record contains a correct transcript of the proceeding in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON,
(Seal) Clerk.

APPENDIX B

Statutes and Regulations Involved

GENERAL CITY LAW, ARTICLE 2-B—GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

"§ 24-a. * * *

"* * * any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city, * * *. Every such local law in the terms shall be, substantially, as follows:

* * * * *

"§ 2. **Imposition of tax. a. For the privilege of** carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, during each year, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year * * *."

(Section 24(a), N. Y. State General City Law.)